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March 7, 2013

*Via Certified Mail and Electronic Mail*

Rutherford Electric Membership Corporation  
c/o W. Edward Poe, Jr.  
Three Wells Fargo Center  
401 S. Tryon Street, Suite 3000  
Charlotte, NC 28202

**Re: Rutherford Electric Membership Corporation's Proposed 100 kV  
Transmission Line/Notice Pursuant to 16 U.S.C § 1540(g)**

Dear Mr. Poe:

We are writing on behalf of our client, 130 of Chatham, LLC ("130 of Chatham"), concerning the 100 kV transmission line (the "Transmission Line") that your client Rutherford Electric Membership Corporation ("REMC") proposes to construct in Rutherford and McDowell Counties, North Carolina.<sup>1</sup> The purpose of the Transmission Line is to connect two existing substations, the Thermal City substation and the Dysartsville substation, owned by REMC. REMC's proposed route for the Transmission Line crosses extremely high-value natural heritage land owned by 130 of Chatham, referred to as the Box Creek Wilderness.

On the cusp of the Blue Ridge and Piedmont ecoregions, Box Creek Wilderness is an essential link in the ecological corridor between the South Mountains and the Blue Ridge Escarpment. Due to the abundance of roads and clearings associated with current and historical development, intensive forestry, and agriculture, there are few interior forest areas in North Carolina of the size and quality of Box Creek Wilderness. Encompassing over 5,800 acres, the entire assemblage comprises North Carolina's largest private Registered Natural Heritage Area. The property has long been recognized as a State Significant Natural Heritage Area by the State of North Carolina and as a top conservation priority by the Foothills Conservancy of North Carolina. Its more than 50 miles of streams are a critical part of the watershed that feeds the Second Broad River, which supplies the citizens of Forest City, Bostic, and Ellenboro with their

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<sup>1</sup> On February 13, 2013, we submitted a request for information to Rural Utilities Service ("RUS") pursuant to the Freedom of Information Act, 5 U.S.C. § 552, seeking information relating to the Transmission Line, as well as to RUS funding and environmental review of REMC infrastructure. We have not yet received any information in response to this request. The time sensitivity of the situation necessitates that we transmit this letter now based on our current understanding of the facts relating to the Transmission Line. We reserve the right to amend this letter upon receiving the requested information from RUS.

drinking water. Biological inventories to date have identified over 100 rare and priority conservation species of plants and animals as designated by the Natural Heritage Program and the Wildlife Resources Commission. As a result of its "Outstanding" categorization, the highest possible ranking by the Natural Heritage Program, the Box Creek Wilderness is recognized as one of the top 75 Significant Natural Heritage Areas in the state. Last year the North Carolina Natural Heritage Program designated Box Creek Wilderness as an official North Carolina Registry of Natural Heritage Area to promote and preserve its outstanding natural diversity and unique flora and fauna.

As you know, REMC has initiated condemnation proceedings in Rutherford County Superior Court to acquire by eminent domain a 2.5-mile long, 100-foot wide easement across Box Creek Wilderness for construction of the Transmission Line. The Transmission Line will require the permanent clearing of a 100-foot wide power line right-of-way across the heart of Box Creek Wilderness, bisecting an otherwise large, contiguous, and maturing interior forest area. The construction and maintenance of the Transmission Line in the manner proposed by REMC would have devastating impacts to the fragile and rare ecology of Box Creek Wilderness, including potential impacts to the federally threatened bog turtle and the federally endangered Indiana bat.

We are therefore writing specifically to request that REMC stay the condemnation proceeding and all other major actions relating to the construction of the Transmission Line until all applicable federal, state and local laws have been complied with, including:

1. That pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321, *et seq.*, a NEPA document is prepared that addresses the environmental impacts of a transmission line connecting the Dysartsville Substation and the Thermal City Substation and that evaluates the impacts of alternative routes, including REMC's proposed route through Box Creek Wilderness;<sup>2</sup>
2. Either the Corps consults with the United States Fish & Wildlife Service ("FWS") pursuant to Section 7 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536, and FWS issues an incidental take permit, or REMC prepares and submits an incidental take permit application and habitat conservation plan and FWS issues an incidental take permit pursuant to Section 10 of the ESA, 16 U.S.C. § 1539;

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<sup>2</sup> We understand that a permit from the U.S. Army Corps of Engineers ("USACE" or the "Corps") under Section 404 of the Clean Water Act, 33 U.S.C. § 1344, (as well as a Section 401 Water Quality Certification from the North Carolina Division of Water Quality ("DWQ")) will be required for construction of the Transmission Line. The Corps will therefore be required to comply with NEPA by preparing an environmental document and to consult with the United States Fish & Wildlife Service under Section 7 of the Endangered Species Act. Thus, REMC should stay all major actions relating to construction of the Transmission Line until the Corps has complied with NEPA and the ESA.

3. The Corps issues a permit pursuant to Section 404 of the Clean Water Act and DWQ issues a Section 401 Water Quality Certification for the construction of the Transmission Line.

As discussed below, we believe that REMC is required by law to take these actions. We therefore hope that REMC will voluntarily agree to take such actions without requiring the 130 of Chatham to pursue resolution of this matter through litigation.

Pursuant to 16 U.S.C. § 1540(g)(2)(A)(iii), we are simultaneously giving the Secretary of Interior notice of our contention that REMC will violate the Endangered Species Act, 16 §§ 1531, *et seq.*, if it proceeds with the Transmission Line. We believe that the Transmission Line will result in the imminent “take” of a listed species and that REMC will therefore be in violation of the Endangered Species Act, 16 §§ 1531, *et seq.*, if it proceeds with the Transmission Line without first obtaining an incidental take permit and obtaining FWS approval of a habitat conservation plan for the affected species. *See American Rivers v. U.S. Army Corps of Engineers*, 271 F. Supp.2d 230 (D.D.C. 2003) (holding that a “take” is actionable once a “take is shown to be imminent”). Our client intends to commence an action in federal court pursuant to 16 U.S.C. § 1540(g) within sixty (60) days unless REMC agrees to suspend all action relating to the Transmission Line until ESA requirements have been met.

#### BACKGROUND

In December 2011, REMC informed 130 of Chatham of REMC’s intention to construct the Transmission Line across Box Creek Wilderness. 130 of Chatham expressed its strong objection to this proposed action. It met with REMC on multiple occasions to share information about the ecological importance of the site and the significant adverse impacts of the Transmission Line, and in an effort to develop mutually agreeable alternatives. In addition, during this time 130 of Chatham engaged an experienced power line design engineer to identify viable alternatives to REMC’s proposed route and to work with REMC in evaluating those alternatives. Despite 130 of Chatham’s objection to REMC’s planned route and its having identified other feasible, less costly, and less environmentally damaging alternative routes for the line, on January 24, 2013, REMC filed a petition to condemn a 2.5-mile long, 100-foot wide easement across Box Creek Wilderness, thereby initiating the process of constructing the Transmission Line as proposed.

#### DISCUSSION

Prior to undertaking projects that will affect the environment and any endangered or threatened (collectively, referred to as “listed”) species, federal agencies and responsible parties, including REMC, must follow certain procedures.

### **National Environmental Policy Act**

NEPA requires federal agencies and responsible parties to analyze the environmental impacts of particular actions before proceeding with such actions. 42 U.S.C. § 4332(2)(C). These actions include “new and continuing activities , including projects . . . entirely or partly financed , assisted, conducted, regulated or approved by federal agencies” that will affect the environment. 40 C.F.R. § 1508.18(a). As previously noted, the Section 404 permit required for construction of the Transmission Line constitutes major federal action that will significantly affect the environment under NEPA, thus triggering a requirement for NEPA review. *See Maryland Conservation Council, Inc. v. Gilchrist*, 808 F.2d 1039, 1042 (4th Cir. 1986); *Maryland Native Plant Society v. U.S. Army Corps of Engineers*, 332 F. Supp.2d 845, 849 (D.Md., 2004) (“Whenever the Corps issues an individual permit for a proposed project under § 404(a), or a general permit for categories of activities under § 404(e), it must prepare an EIS or EA pursuant to § 102(2)(C) of NEPA.”).

REMC is prohibited from moving forward with the Transmission Line until the Corps complies with its obligations under NEPA and other applicable federal obligations. The Fourth Circuit has held that NEPA provides a private cause of action for injunctive relief brought against non-federal actors “where a party seeks to preserve federal rights under NEPA pending the outcome of federal procedural review.” *South Carolina Wildlife Federation v. Limehouse*, 549 F.3d 324 (4th Cir. 2008). As held by the Fourth Circuit, compliance with NEPA is required before any portion of the project is built. *Gilchrist*, 808 F.2d at 1042 (If the county were allowed to construct segments of the highway, “[t]he completed segments would stand like gun barrels pointing into the heartland of the park.”) (internal quotations and citations omitted). Otherwise, the completed segments may influence the agency decision or limit the choice of reasonable alternatives. *Id.* at 1042-43.

### **Endangered Species Act**

On behalf of 130 of Chatham, Skybox Ecological Services, LLC conducted a survey of bats at Box Creek Wilderness. According to the acoustic data analyzed using EchoClass version 1.1, the currently accepted software for analyzing recorded files, it is highly likely that Indiana bats, a federally-endangered species, are present at Box Creek Wilderness. *See* attached Exhibit 1. To confirm the presence of Indiana bats at Box Creek Wilderness, 130 of Chatham intends to perform additional mist-netting between May 15 and August 15, 2013. In addition, bog turtles, a federally-threatened species, have been confirmed in close proximity to Box Creek Wilderness and potential migration routes and breeding areas for bog turtles have been identified at Box Creek Wilderness. *See* attached Exhibit 2. 130 of Chatham is conducting further studies to confirm that threatened bog turtles are present at or use Box Creek Wilderness.

In the absence of federal consultation pursuant to Section 7 of the ESA, 16 U.S.C. § 1536,<sup>3</sup> REMC should not proceed with the Transmission Line unless it prepares and submits an incidental take permit application and habitat conservation plan and FWS issues an incidental take permit. Section 9 of the ESA, 16 U.S.C. § 1538, prohibits the “take” of listed species, including the “imminent” take of listed species. *See American Rivers*, 271 F. Supp.2d 230 (D.D.C. 2003) (holding that a “take” is actionable once a “take is shown to be imminent”). An injunction is appropriate to enjoin activities where it is shown that there is a reasonable likelihood that such activities will harm a listed species. *See Marbled Murrelet v. Babbitt*, 83 F.3d 1060 (9th Cir. 1996) (holding that a reasonably certain threat of imminent harm to a protected species is sufficient for issuance of an injunction, and specifically rejecting the defendant's claim that the harm must have already occurred).

FWS is authorized to exempt non-federal entities from the Section 9 take prohibition through the issuance of incidental take permits. In order for a non-federal entity to apply for and obtain an incidental take permit, the applicant is required to prepare and submit an incidental take permit application and a habitat conservation plan. Section 10 of the ESA requires, among other things, that the impacts of any incidental takes will be “minimized and mitigated” to the “maximum extent practicable.” 16 U.S.C. § 1539(a)(2). Prior to issuing an incidental take permit, FWS must determine that the take that results from the underlying action will not “appreciably reduce the likelihood of the survival and recovery of the species in the wild.” 16 U.S.C. § 1539(a)(2)(B)(iv). Because listed species occupy and/or use Box Creek Wilderness and the Transmission Line will likely result in harm to the listed species, REMC’s construction of the Transmission Line without an incidental take permit would violate the ESA.

### CONCLUSION

Based upon the information and legal standards discussed above, 130 of Chatham requests that REMC stay the condemnation proceeding and all other major actions relating to construction of the Transmission Line until all applicable federal, state and local laws have been complied with, including (i) a NEPA document is prepared that addresses the environmental impacts of a transmission line connecting the Dysartsville Substation and the Thermal City Substation and that evaluates the impacts of alternative routes, including REMC’s proposed route through Box Creek Wilderness; and (ii) either the Corps consults with FWS pursuant to Section 7 of the ESA and FWS issues an incidental take permit, or REMC prepares and submits an incidental take permit application and habitat conservation plan and FWS issues an incidental

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<sup>3</sup> Agency action under the ESA includes actions taken to issue a permit sought by a private applicant. Section 7(a)(3), 16 U.S.C. § 1536(a)(3), provides that consultation is required on “any prospective agency action” relating to a “prospective permit or license” whenever listed species may be present in the area affected by the application. Consultation is particularly significant under Section 404 of the Clean Water Act where the issuance of individual and nationwide permits approvals by USACE has been determined to be “agency action” for purposes of Section 7 of the Endangered Species Act. *See Fund for Animals, Inc. v. Rice*, 85 F.3d 535 (11th Cir. 1996); *Riverside Irr. Dist. v. Andrews*, 758 F.2d 508, 511 (10th Cir. 1985). Therefore, the Corps is required to consult with FWS before issuing a Section 404 permit to REMC.

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March 7, 2013  
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take permit pursuant to Section 10 of the ESA; and (iii) the Corps issues a permit pursuant to Section 404 of the Clean Water Act and DWQ issues a Section 401 Water Quality Certification.

130 of Chatham appreciates your careful consideration of this important matter and looks forward to receiving your response, which we request within sixty (60) of the date of this letter. If 130 of Chatham does not receive an acceptable response from REMC within this time period, it intends to pursue all other available options for resolving this matter, including litigation pursuant to NEPA and the ESA.

With best wishes,

Sincerely yours,

KILPATRICK TOWNSEND & STOCKTON LLP



Steven J. Levitas

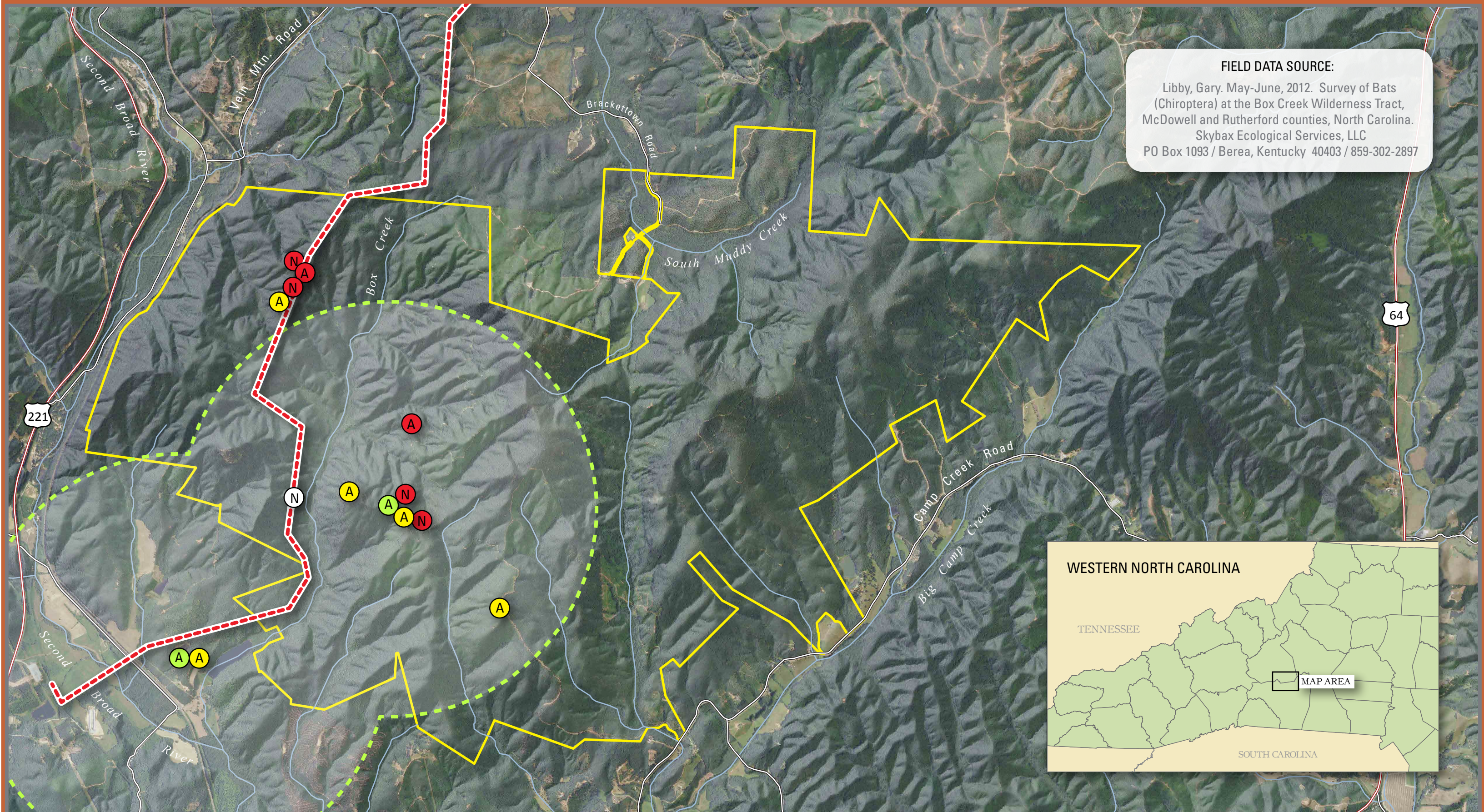
Attachments

cc: Ken Salazar, Secretary, U.S. Department of Interior  
John Padalino, Administrator, Rural Utilities Service  
John E. Skvarla, III, Secretary, N.C. Department of Environment and Natural Resources  
Justin McCorcle, U.S. Army Corps of Engineers  
Tim Sweeney  
William Clarke, Esq.  
Jeff Fisher



# FIELD DATA SOURCE:

Libby, Gary. May-June, 2012. Survey of Bats (Chiroptera) at the Box Creek Wilderness Tract, McDowell and Rutherford counties, North Carolina.  
Skybox Ecological Services, LLC  
PO Box 1093 / Berea, Kentucky 40403 / 859-302-2897



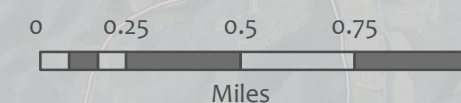
## Box Creek Wilderness Bat Ecology

- A = Acoustic Record    N = Netted Record
- Myotis sodalis / Indiana Bat - E / E / S1S1 / G2
  - Myotis septentrionalis / Northern Long-eared Bat - SR / - / S3 / G3
  - Myotis lucifugus / Little Brown Bat - SR / - / S3 / G3
  - Lasurus cinereus / Hoary Bat - W2 / - / S3S4 / G5

REMC Preferred  
Power Line  
Right of Way

Box Creek Wilderness Boundary

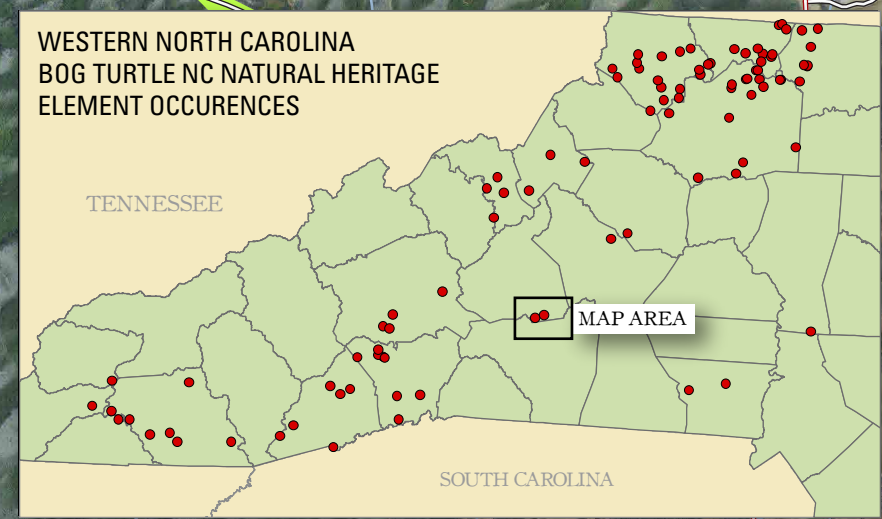
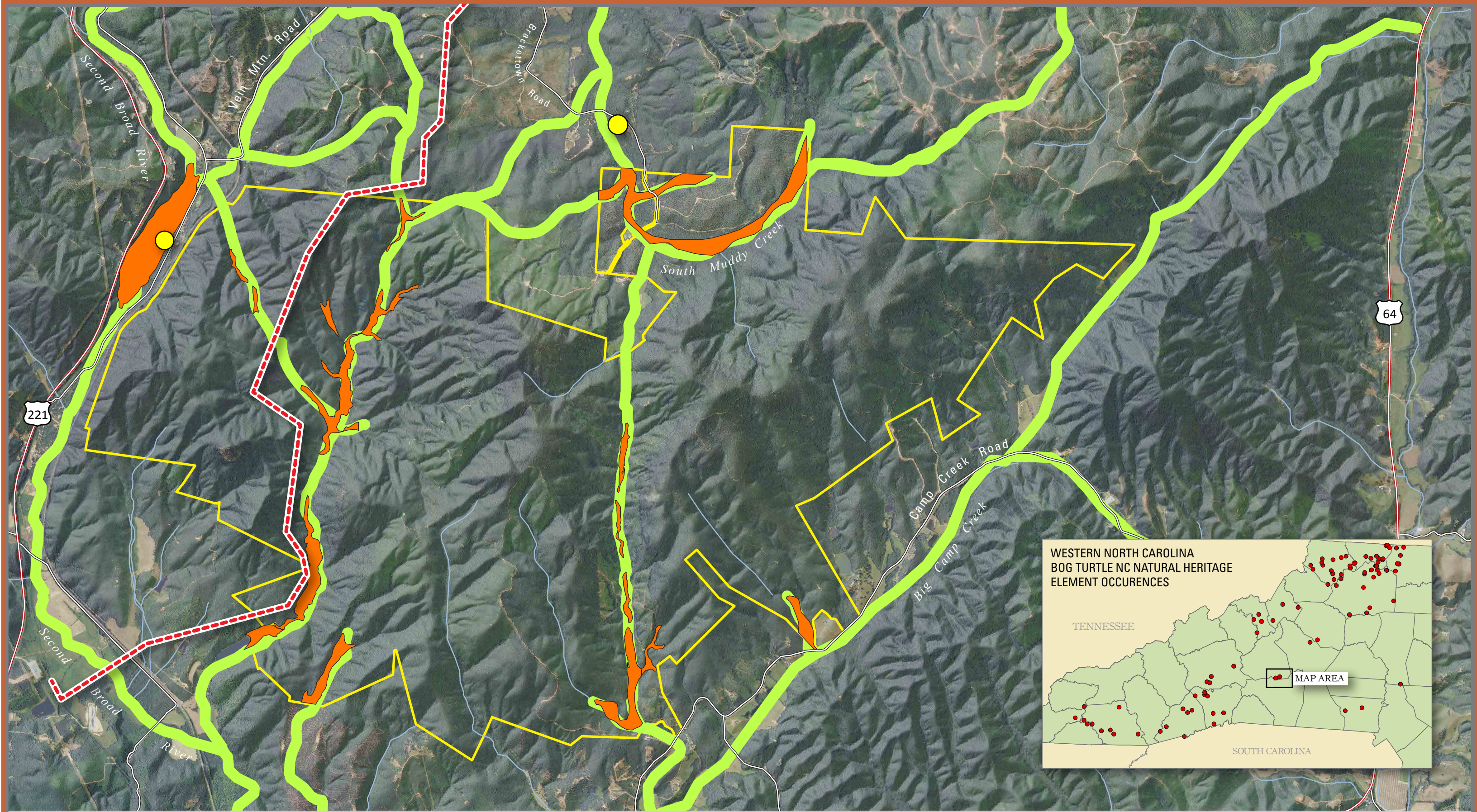
Indiana Bat One Mile Buffer



Unique  
Places







# Box Creek Wilderness Bog Turtle Ecology

- Box Creek Wilderness Boundary
- Bog Turtle Potential Migration Routes
- Potential Bog Turtle Breeding Areas (with restoration efforts)
- Bog Turtle NC Natural Heritage Element Occurrence

REMC Preferred Power Line Right of Way

